

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL NUMBER
	:	
	:	
v.	:	00-681
	:	
	:	
IRL "CHIP" WARD	:	

MEMORANDUM & ORDER

SURRICK, J.

APRIL 16, 2001

This criminal case has been brought against Defendant Irl "Chip" Ward ("Defendant"), the President of Concept Sciences, Inc. ("CSI"), for alleged violations of the Occupational Safety and Health Act, 29 U.S.C. § 651, et seq. ("OSHA") and the regulation promulgated thereunder for Process Safety Management of Highly Hazardous Chemicals, 29 C.F.R. § 1910.119. Presently before the Court is Defendant Irl "Chip" Ward's Motion to Dismiss Indictment Pursuant to Fed. R. Crim. P. 12(b)(1) and (2) (the "Motion to Dismiss," Docket No. 11), the Government's Response in Opposition to Defendant's Motion to Dismiss Indictment Based Upon Defendant Not Being an "Employer" Under OSHA (the "Response," Docket No. 22) and the Reply in Further Support of Defendant's Motion to Dismiss Indictment Based Upon Defendant's Not Being an "Employer" Under OSHA (the "Reply," Docket No. 27). In summary, the Motion to Dismiss will be denied because the Indictments substantially trace the language of the statute under which Defendant has been charged and provide sufficient facts to

enable Defendant to properly defend himself.

Located in Allentown, Pennsylvania, CSI is a chemical manufacturer in the business of producing hydroxylamine, a chemical used in the pharmaceutical and semi-conductor industries as a stripping or cleaning agent. At high levels of concentration, hydroxylamine can be extremely unstable and explosive. On February 19, 1999, CSI experienced an explosion at its Allentown facility that resulted in the death of four employees and one non-employee. The Government contends that, as President of CSI and because of his extensive control over the company, Defendant was an “employer” as defined in OSHA, and therefore is subject to criminal charges under 29 U.S.C. § 666(e), which states that an employer who violates a regulation promulgated pursuant to OSHA, resulting in the death of any employee, is guilty of a crime. By way of his Motion to Dismiss, Defendant disputes the contention that he is an “employer” for purposes of OSHA and argues that the Indictment must therefore be dismissed.

An “employer” is defined under OSHA as “a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.” 29 U.S.C. § 652(5). A “person” is defined as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 U.S.C. § 652(4). “Employee” is defined as “an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(6).

Congress intended to subject only employers, and not employees, to criminal liability under § 666(e). See *United States v. Shears*, 962 F.2d 488, 490-92 (5th Cir. 1992) (holding that a supervisory employee was not an employer who could be held criminally liable

under OSHA)(citing *Atlantic & Gulf Stevedores v. Occupational Safety & Health Review Comm’n*, 534 F.2d 541, 553 (3d Cir. 1976)(concluding that OSHA gives neither the Commission nor the Secretary of Labor the power to sanction employees for disregarding safety standards and commission orders)); *United States v. Doig*, 950 F.2d 411, 414 & n.5 (7th Cir. 1991)(employee could not be subjected to criminal liability as aider and abettor of corporate employer’s alleged criminal violation of OSHA)(citing *Atlantic & Gulf Stevedores*, 534 F.2d at 553).

It has been held, however, that “an officer or director’s role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation, and is therefore an employer under § 666(e).” *United States v. Cusack*, 806 F.Supp. 47, 51 (D.N.J. 1992)(denying motion to dismiss by corporation’s sole officer charged with violation of OSHA under § 666(e), and indicating that determination of whether officer was employer was question for jury).

The instant Indictment contains the following allegations with respect to whether Defendant is an employer for purposes of OSHA:

1. Defendant Irl “Chip” Ward is a Ph.D. chemist and was President of CSI, one of the majority shareholders (together with his wife and father), Project Manager for the HA distillation process, and the highest ranking officer.

Indictment, ¶ 7.

2. As President of CSI, defendant Irl “Chip” Ward’s duties and responsibilities included the following: (a) directing the overall operations of the corporation, including its two chemical processing facilities; (b) actively supervising work in which OSHA regulated activities were conducted; (c) having final decision making authority on all matters; and (d) ultimately assuming the proper training and safety of his employees,

and complying with all OSHA standards and regulations.

Indictment, ¶8.

3. Defendant IrI “Chip” Ward was an “employer” as defined in OSHA and subject to the OSHA regulations.

Indictment, ¶9.

Although we have serious reservations concerning whether these facts, even if proven in conjunction with the facts alleged in the Government’s Response, will ultimately be sufficient to support a finding that Defendant is an employer for purposes of OSHA, see *Cusack*, 806 F.Supp. at 48-49, 50 (finding that the facts alleged suggested that the defendant exercised such control over the corporation that he in fact was the corporation), the standard governing a motion to dismiss a criminal indictment requires that we deny Defendant’s Motion at this stage. See *United States v. DeLaurentis*, 230 F.3d 659 (3d Cir. 2000) (holding that “Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment’s charges,” and thus reversing dismissal where indictment “substantially track[ed] the language of the statute.” (citing *United States v. Sampson*, 371 U.S. 75, 78-79 (1962))).

The Indictment alleges all of the elements of the offense, fairly informs the defendant of that which he must be prepared to meet in the preparation of his defense, and protect him against double jeopardy. See *United States v. Winer*, 323 F.Supp. 604, 605 (E.D. Pa. 1971). In particular, the Indictment informs Defendant that he is accused of being an “employer” for purposes of the alleged OSHA violations, see Indictment, ¶9, and it provides Defendant with basic facts establishing his relationship to CSI, see Indictment, ¶¶7, 8. See *Butzman v. United*

States, 205 F.2d 343, 348 (6th Cir. 1953) (stating that “[a]n indictment is sufficient to meet modern requirements if it alleges basic facts covering the essential elements of the crime against the United States with enough particularity to fairly apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense.”).

An appropriate Order follows:

ORDER

AND NOW, this day of April, 2001, **IT IS HEREBY ORDERED THAT** ,
Defendant’s Motion to Dismiss is **DENIED** .
AND IT IS SO ORDERED .

R. Barclay Surrick, Judge